Jit Singh a/l Kishen Singh v Bakshi Singh a/l Kishen Singh & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–809 OF 2000
ABDUL WAHAB PATAIL J
26 OCTOBER 2009

Land Law — Indefeasibility of title and interests — Fraud — Whether dishonesty proven — Whether false acknowledgment made regarding payment of full purchase price at time of registration of transfer — Whether transferee knew of plaintiff's adverse unregistered interest arising from private agreement — Whether sale price lower than valuation of property — Whether purchaser's title indefeasible — National Land Code s 340(1) & (2)

Land Law — Indefeasibility of title and interests — Standard of proof — Whether clear unequivocal evidence required to discharge high standard of proof to dislodge indefeasible title of registered proprietor

Land Law — Sale of land — Bona fide purchaser — Whether third party bona fide purchaser — Whether false acknowledgment made regarding payment of full purchase price — Whether transferee knew of plaintiff's adverse unregistered interest arising from private agreement — Whether sale price lower than valuation of property

This action was commenced by the plaintiff against his brother ('first defendant') and the second defendant in respect of a property which was previously registered in the name of the first defendant and now transferred to the second defendant. The plaintiff claimed that there was an agreement ('the agreement') between the plaintiff and his three brothers that all of them would have a share in the property. According to the plaintiff, the first defendant wrongfully sold the property to the second defendant and the plaintiff therefore sought to set aside the sale and to strike out the registration in the name of the second defendant. The plaintiff claimed that the relevant payment receipt was dated 31 December 2000, suggesting therefore that when the transfer was registered on 12 April 2000 it was before full payment was made, and that the acknowledgement of full payment relied upon to register the transfer was untrue. The plaintiff further claimed that the sale and purchase price of RM60,000 was well below the valuation of the property which was RM150,000.

Held, dismissing the action with costs:

(1) There was an acknowledgment of receipt of full payment made by the first defendant at the time of registration. There was also an alternative consistent explanation, that the date 31 December 2000 in the receipt was the date of issue of the receipt and not the date of receipt of full payment. Since the burden of proof was upon the plaintiff, and in the absence of fact or evidence justifying the other conclusion, the conclusion less adverse against the other party must be drawn (see paras 7–8).

(2) The second defendant having been entered upon the register of titles as the registered proprietor, his title conferred thereby could only be defeated in any of the instances set out under s 340 of the National Land Code. Clear unequivocal evidence is required to discharge the high standard of proof to dislodge the indefeasible title of a registered proprietor (see paras 9 & 11).

(3) Fraud in s 340 implies dishonesty. In considering whether there is fraud, the plaintiff had to first establish his right to a share against the registered title of the first and, after that, the second defendant. To establish his right, the plaintiff relied upon the agreement, which was a private agreement. The plaintiff failed to prove upon a balance of probabilities that the second defendant knew of the agreement and of the plaintiff's rights to a share so as to impute dishonesty and fraud (see paras 12–14 & 22).

(4) A sale and purchase price is a contractual bargain arrived at between the seller and purchaser and has nothing to do with the valuation. On its own it is not sufficient to discharge the burden of proving the second defendant was not a bona fide purchaser (see para 25).

[Bahasa Malaysia summary

Tindakan ini dimulakan oleh plaintif terhadap abangnya ('defendan pertama') dan defendan kedua mengenai hartanah yang sebelumnya didaftarkan di bawah nama defendan pertama dan kini dipindahkan kepada defendan kedua. Plaintif mendakwa bahawa terdapat perjanjian ('perjanjian') di antara plaintif dan ketiga-tiga abangnya bahawa mereka semua mempunyai bahagian dalam hartanah tersebut. Menurut plaintif, defendan pertama secara salah menjual hartanah tersebut kepada defendan kedua dan oleh itu, plaintif memohon penjualan tersebut diketepikan dan pendaftaran di bawah nama defendan kedua dipotong. Plaintif mendakwa bahawa resit bayaran yang berkaitan bertarikh 31 Disember 2000, menyatakan bahawa apabila pemindahan tersebut didaftarkan pada 12 April 2000, pemindahan tersebut dilaksanakan sebelum bayaran penuh dibuat, maka pengakuterimaan

A bayaran penuh yang dihujahkan sebagai pendaftaran pemindahan tersebut adalah tidak benar. Plaintif selanjutnya mendakwa bahawa harga jualan dan belian RM60,000 adalah di bawah nilaian hartanah tersebut yang bernilai RM150,000.

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Diputuskan, menolak tindakan dengan kos:

(1) Terdapat pengakuterimaan resit bayaran penuh yang dibuat oleh defendan pertama pada masa pendaftaran. Terdapat juga penjelasan alternatif yang konsisten bahawa tarikh 31 Disember 2000 dalam resit adalah merupakan tarikh resit tersebut dikeluarkan dan bukannya tarikh resit bayaran penuh. Memandangkan beban membukti terletak pada plaintif, dan dalam ketiadaan fakta atau keterangan yang menjustifikasikan kesimpulan lain, kesimpulan yang kurang bertentangan terhadap pihak lain harus diputuskan (lihat perenggan 7–8).

(2) Defendan kedua didaftarkan dalam daftar hakmilik sebagai tuan punya berdaftar, hakmiliknya hanya boleh dikecewakan dalam mana-mana contoh yang dinyatakan di bawah s 340 Kanun Tanah Negara. Keterangan jelas nyata diperlukan untuk mengetepikan standard pembuktian yang kukuh bagi melepaskan hakmilik tak boleh sangkal tuan punya berdaftar tersebut (lihat perenggan 9 & 11).

(3) Fraud dalam s 340 menunjukkan ketidakjujuran. Dalam mempertimbangkan sama ada terdapat fraud, pertamanya plaintif perlu membuktikan haknya untuk bahagian tersebut terhadap hakmilik berdaftar defendan pertama dan selepas itu, defendan kedua. Bagi membuktikan haknya, plaintif bergantung kepada perjanjian, yang merupakan perjanjian persendirian. Plaintif gagal membuktikan berdasarkan imbangan kebarangkalian bahawa defendan kedua tahu mengenai perjanjian tersebut dan hak plaintif untuk bahagian tersebut bagi menunjukkan ketidakjujuran dan fraud (lihat perenggan 12–14 & 22).

(4) Harga jualan dan belian merupakan tawaran kontraktual di antara penjual dan pembeli dan tidak ada kena-mengena dengan penilaian. Adalah tidak mencukupi untuk melepaskan beban membuktikan defendan kedua bukan pembeli bona fide dengan sendirinya (lihat perenggan 25).]

Notes

For cases on bona fide purchaser, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3931–3933.

For cases on fraud, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2929–2960.

For cases on standard of proof, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2895–3005.

Cases referred to

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294; [1994] 2 CLJ 14, SC (folld)

Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224; [1971] 1 LNS 96, FC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465; [1998] 1 CLJ 793, FC (refd)

Saminathan v Pappa [1981] 1 MLJ 121; [1980] 1 LNS 174, PC (refd)

Legislation referred to

National Land Code ss 340, 341

Jasvinjit Singh (AJ Ariffin, Yeo & Harpal) for the plaintiff.

R Kengadharan (R Prabhakaran with him) (R Kengadharan & Co) for the second defendant.

Abdul Wahab Patail J:

[1] This action was commenced by the plaintiff Jit Singh a/l Kishen Singh against his brother Bakshi Singh a/l Kishen Singh ('the first defendant') and one Adaikkalasamy a/l Anthony Muthu ('the second defendant') in respect of a property known as HS(M) 210, No PT 1909, Mukim Ampang, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, previously registered in the name of the first defendant and now transferred to the second defendant.

[2] The first defendant has since died. The plaintiff is proceeding only against the second defendant.

[3] The plaintiff's case relies upon the following facts:

(a) The first defendant is the oldest of four brothers, the others being the plaintiff, one Dalip Singh dan one Pauja Singh, all a/l Kishen Singh;

(b) By an agreement dated 27 December 1963 ('the agreement') it was agreed between the brothers that:

(i) All four brothers will be partners in, inter alia, the property;

(ii) All partners/brothers will work together and no money will be spent on the above stated property without the consent or approval of all the brothers/partners;

(iii) In the event of the demise of anyone of the brothers, his share of the property will be transferred to his next of kin; and

(iv) Whatever things or acts to be done on the property may be done, it must be done with the approval of the first defendant.

(c) The plaintiff testified that it was also agreed that any one of the brothers may enjoy the occupation of the property for as long as they lived or decided that on condition that all expenses, maintenance and the like be borne by the brother occupying the property and that in the event the property ought to be sold, for any reason whatsoever, any one or more of the brothers will be given the first right of refusal to purchase the property and the proceeds will be divided between the brothers equally.

(d) There was a long uninterrupted occupation of the property by the plaintiff, his wife and children and even his sister and her husband.

(e) That the first defendant wrongfully sold the property to the second defendant.

(f) The property is currently registered in the name of the second defendant.

[4] The plaintiff seeks orders, inter alia, to set aside the sale and purchase between the first defendant and the second defendant, the Federal Territory property administrator to strike out the registration in the name of the second defendant, the second defendant to re-convey 1/4 of the property into the name of the plaintiff, and hold the balance in trust for the other three brothers of the plaintiff, and alternatively, declare the plaintiff to be owner of 1/4 share and the defendants pay the plaintiff a sum being 1/4 of the market value of the property, damages, interest and costs.

[5] The wrongs relied upon by the plaintiff are:

(a) The registration was obtained by means of an insufficient or void instrument; and

(b) The second defendant was a party to a fraud on the plaintiff.

INSUFFICIENT OR VOID INSTRUMENT

[6] The first ground relies upon the fact the receipt relied upon is dated 31 December 2000, suggesting therefore that when the transfer was registered on 12 April 2000 it was before full payment was made, and that the acknowledgement of full payment relied upon to register the transfer was untrue. The plaintiff relied upon *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294; [1994] 2 CLJ 14 (SC).

[7] But the registered proprietor of the property is not the plaintiff but the first defendant. The validity of the transfer of title under the National Land Code is an issue between the first and the second defendant. The latter as the registered proprietor had at the time of registration of transfer acknowledged having received full payment.

[8] Examination of the receipt shows that 31 December 2000 is the date of the receipt. It is true that ordinarily one would expect a receipt to be issued on the date of payment. But in the light of the fact there is an acknowledgment of receipt of full payment made at the time of registration, there is an alternative consistent explanation, that is that the date 31 December 2000 in the receipt is the date of issue of the receipt and not the date of receipt of full payment. Testimony on record was to the effect full payment was made within the terms of the agreement, ie on or before 31 December 2000. The evidence does not preclude full payment on or before registration on 12 April 2000. Since the burden of proof is upon the plaintiff, and in the absence of fact or evidence justifying the other conclusion, the conclusion less adverse against the other party must be drawn.

THE SECOND DEFENDANT WAS PARTY TO A FRAUD ON THE PLAINTIFF

[9] The second defendant having been entered upon the register of titles as the registered proprietor, his title conferred thereby can only be defeated in any of the instances set out under s 340 of the National Land Code. The indefeasible title is only defeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[10] The indefeasibility of the registered proprietor's title is further buttressed by s 341 which provides:

> Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Act 1953, shall in no circumstances operate to extinguish any title to, or interest in, land.

[11] It requires, therefore, clear unequivocal evidence to discharge the high standard of proof to dislodge the indefeasible title of a registered proprietor, which the second defendant now happens to be in this case.

[12] In considering whether there is fraud generally, it must be borne in mind fraud in this section implies dishonesty (*Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465; [1998] 1 CLJ 793 (FC)).

[13] In considering whether there is fraud in this case, it is necessary to bear in mind also that the plaintiff is a person not involved in the transaction who must first establish his right to a 1/4 share against the registered titles of the first and, after that, the second defendant.

[14] To establish his right to a 1/4 share, the plaintiff relied upon the grounds there is an agreement dated 27 December 1963 between the plaintiff and the first defendant and two other brothers, and the fact he and his immediate family lived upon the land. But then his sister and her husband who are not parties to the agreement of 27 December 1963 also lived on the land.

[15] Be that as it may, the fact remains that the 1963 agreement is a private agreement between the brothers. Two observations follow.

[16] Firstly, in order to establish his right to a 1/4 share he must proceed with an action against the first defendant. But the first defendant is deceased and the plaintiff has abandoned his action against him.

[17] Secondly, not being a party to the 27 December 1963 agreement, the second defendant would not necessarily have knowledge of it.

[18] The second defendant had maintained he was unaware of the 27 December 1963 agreement when he signed the sale and purchase agreement with the first defendant on 27 October 1999 and only became aware of that agreement when he obtained a copy of the private caveat lodged by the plaintiff vide presentation No 860/2000.

[19] The burden is, therefore, upon the plaintiff to prove that the second defendant had knowledge at the time he entered into the sale and purchase agreement with the first defendant of the plaintiff's 1/4 share interest and sought fraudulently to deprive the plaintiff of it.

[20] The factual and evidential matrix on this issue is as follows. The second defendant is not party to the 1963 agreement. The sole name on the

register of titles as the registered proprietor when it was transferred to the second defendant was the first defendant. No action was taken by the plaintiff to put his interest on the register of titles.

[21] The National Land Code was enacted to protect proprietors of land. It does so by proving for registration, and conferring upon registration an indefeasible title, defeasible only upon certain grounds. But it behoves upon proprietors to avail themselves of that protection by registering themselves.

[22] Unprotected by registration, the plaintiff also failed to produce any evidence sufficient to prove upon a balance of probabilities that the second defendant did in fact know of the 27 December 1963 agreement and of the plaintiff's rights to a 1/4 share so as to impute dishonesty and fraud.

[23] The plaintiff's case fundamentally relied upon the testimony of the plaintiff himself. His age and health suggested the exercise of patience and care to hear his testimony. Apart from some physical frailty, he had no hesitation to assert himself clearly and firmly. As a witness he had come to court to say what he wanted to say and many times paid scant attention to the questions put to him to say what he, in his mind, had set out to say.

[24] Examining his testimony, it is plain that while it contains testimony as to direct evidence, the parts of his testimony material to this action are his firm opinions and conclusions which he expressed in no uncertain terms. But while one would not go so far as to say he was not telling the truth, one could not safely say that his opinions and conclusions are safe to rely upon as they stand.

[25] The strongest argument for the plaintiff is that the sale and purchase price of RM60,000 is well below the valuation of the property as evident from the stamp duty assessed which put the value at RM150,000. However, a sale and purchase price is a contractual bargain arrived at between the seller and purchaser and has nothing to do with the valuation. It is not the plaintiff's case and there is no evidence before the court that the second defendant acted dishonestly and thereby defrauded the first defendant by convincing him for example that the value of the property is RM60,000. All the evidence are consistent with the first defendant being satisfied with the contractual bargain of RM60,000. On its own it is not sufficient to discharge the burden of proving the second defendant is not a bona fide purchaser.

[26] The totality of the evidence available is certainly far short of proving fraud upon the higher standard of proof required to prove fraud and thereby to render the plaintiff's title defeasible (*Saminathan v Pappa* [1981] 1 MLJ 121; [1980] 1 LNS 174 (PC)). On the record the second defendant remains

a bona fide purchaser for value without notice (*Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 (FC); [1971] 1 LNS 96 (FC)).

[27] In the event, the plaintiff's action for the orders as prayed must fail.

[28] The plaintiff's action was, therefore, dismissed with costs.

Plaintiff's action dismissed with costs.

Reported by Kanesh Sundrum